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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 122

LILLEY CORNETT, - - - - - - Petitioner,

versus

SWIFT COAL & TIMBER COMPANY,
C. S. LANDRUM, and
AMERICAN COLUMN & LUMBER COMPANY, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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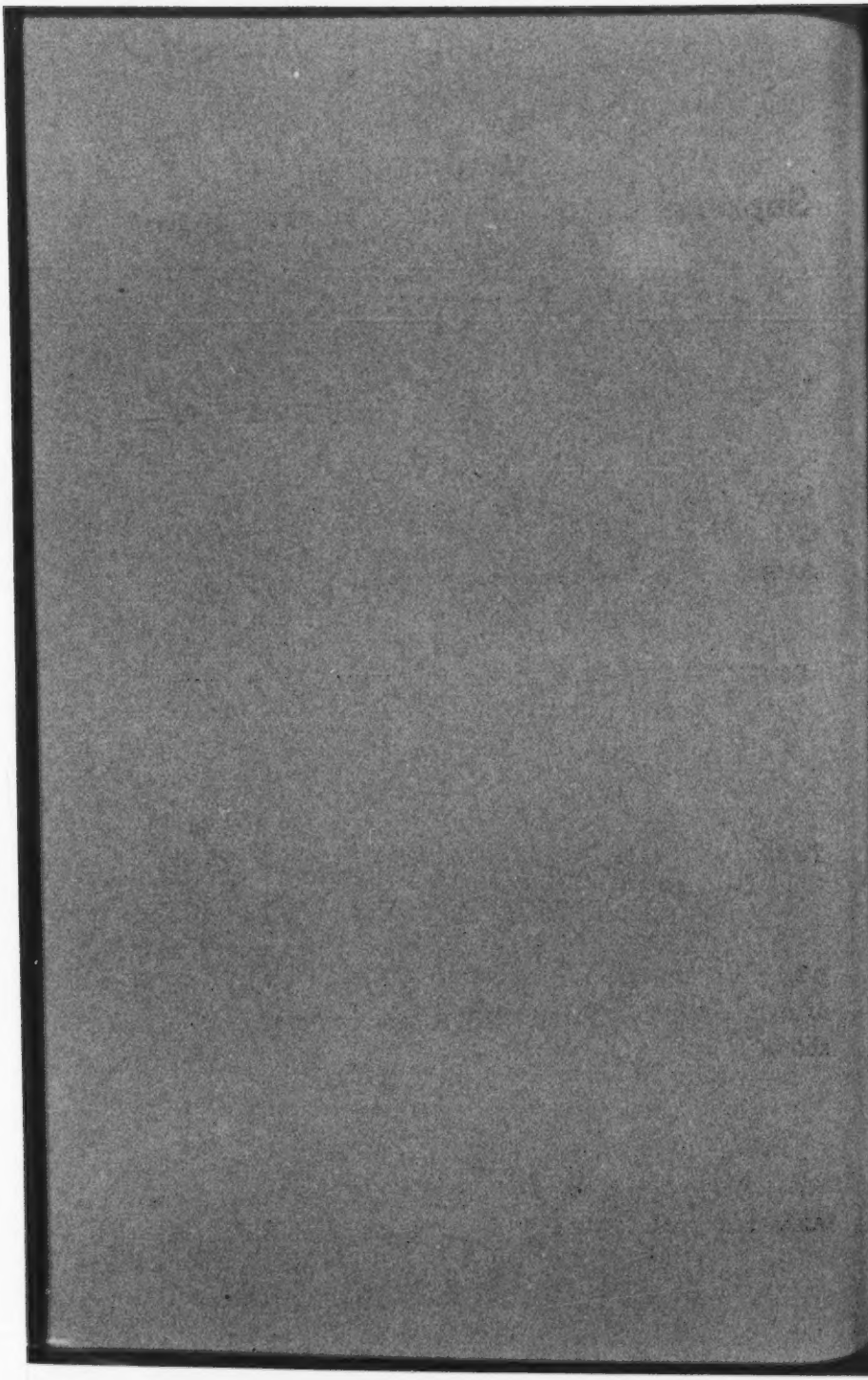
WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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LILLEY CORNETT, - - - - - - - *Petitioner,*

v.

SWIFT COAL & TIMBER COMPANY,
C. S. LANDRUM, AND
AMERICAN COLUMN & LUMBER COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Lilley Cornett, comes now and complaining of an order of the United States Circuit Court of Appeals for the Sixth Circuit, entered April 9, 1940, shows:

I.

In Kentucky by Ky. Stat., Sec. 4052, all property is assessable for taxation as of July 1st, of every year for taxes due the following year. For instance, for taxes

due in 1940, the assessment is as of July 1, 1939. This is true although the assessment may be actually made at a later date.

II.

By Ky. Stat., Sec. 4021, a lien attaches to all assessable property in favor of the State of Kentucky and the county where situate, as of July 1st of each year, the date of assessment.

III.

The learned District Court for the Eastern District of Kentucky, so bound as matter of law (Tr. 15), and by the order hereafter referred to in paragraph XIV, the learned United States Circuit Court of Appeals for the Sixth Circuit affirmed that finding.

IV.

On July 1, 1930, American Column & Lumber Company, hereafter referred to as "Lumber Company," was the owner of 29 parcels of land in Letcher County, Kentucky, aggregating in area nearly 50 acres, which were assessed for taxation as of that date at $5,000.00, and to which a lien then attached to secure payment on or before December 31, 1931, of the taxes levied in 1931.

V.

At that time there were no other liens of any sort against said lands.

VI.

The Lumber Company failed to pay the taxes assessed for the year 1931, on or before December 31, 1931, and on March 7, 1932, proceeding under authority of Ky. Stat., Sec. 4149, the Sheriff of Letcher County, finding no personalty, exposed said lands for sale at the front door of the Court House in Whitesburg, Kentucky, when Lilley Cornett became the purchaser thereof at the price of the taxes due, interest, penalties, cost and commission. Cornett notified said Lumber Company of his purchase, and the lands not having been redeemed within two years, on March 14, 1932, the then Sheriff of Letcher County executed to Cornett a deed to part of these lands, and later a deed to the remainder which had been omitted from the first deed by oversight.

VII.

The validity of this deed was before the Court of Appeals of Kentucky in Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127, and was there upheld as a valid conveyance to Cornett of the fee simple title to these lands.

VIII.

The District Court for the Eastern District of Kentucky and the United States Circuit Court of Appeals for the Sixth Circuit, refusing to follow and apply the law of Kentucky held that the only right which petitioner had was a paramount lien against the lands to

reimburse him for the amount he had paid the Sheriff of Letcher County when he purchased at the tax sale and held this lien was not superior to the lien of Swift, although the lien of Swift was acquired twenty-two days after the tax lien had attached to these lands.

IX.

On July 1, 1930, there was pending in the District Court for the Eastern District of Kentucky at Lexington, suit in equity No. 543, styled Swift Coal & Timber Company, hereinafter called "Swift," Complainant v. American Column & Lumber Company, Defendant, in which complainant sought *inter alia* to recover over $200,000.00 in damages for non-performance of a contract. On July 22, 1930, said complainant filed in the District Court an amended bill, and an affidavit of one Burton by which it sought and procured an attachment against said defendant's property for the sum of $23,000.00. Said attachment was on July 23, 1930, levied on said lands by the Marshal of the Eastern District of Kentucky. Said attachment issued 21 days after said tax lien attached, and was levied 22 days thereafter.

X.

Neither the amended bill nor the affidavit mentioned authorized the issuing of an order of general attachment because neither document contained a sufficient compliance with the provisions of Sec. 196, Ky. Code of Civil Procedure, especially in this that neither con-

tained any allegation of any specific amount that said complainant believed it ought to recover from said defendant, and this was fatal to the jurisdiction of the Court to proceed under said attachment under repeated decisions of the Court of Appeals of Kentucky, among which are:

(a) Worthington v. Cary, 1 Met. 470.
(b) Moore v. Harrod, 101 Ky. 248, 40 S. W. 675.
(c) Hart County Deposit Bank v. Hatfield, 236 Ky. 725, 33 S. W. (2d) 660.
(d) Howard v. Howard, 239 Ky. 160, 39 S. W. (2d) 245.
(e) Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127.

XI.

Conformably to U. S. Rev. Stat., Sec. 915, 17 Stat. at L. 197, 28 U. S. C. A., Sec. 726, the District Court for the Eastern District of Kentucky had adopted by Rule 54 the provisions of the Kentucky Statutes, relating to attachments and hence said Court was bound to follow such statutes as construed by the Court of Appeals of Kentucky, in dealing with or assuming jurisdiction of attachment proceedings.

XII.

As said statutes are construed and applied by the Court of Appeals of Kentucky, the District Court for the Eastern District of Kentucky never acquired jurisdiction to either issue or sustain said attachment, or to entering order of sale thereon.

XIII.

On December 31, 1931, the District Court for the Eastern District of Kentucky sustained said attachment, and on December 17, 1932, entered an order vacating a portion of former orders. On the last named date said suit No. 543 disappeared from the docket of the said District Court, and was not carried on said docket any further, and no other steps or proceedings were taken by the said Swift Coal & Timber Company to enforce said attachment until April 17, 1937, when Swift filed a motion to redocket said suit No. 543, resustaining said attachment and ordering a sale of said lands to satisfy its judgment against the Lumber Company.

XIV.

The District Court for the Eastern District of Kentucky, on May 5, 1937, sustained said motion *in toto*. Petitioner had no notice thereof, and on June 7, 1937, instituted in said District Court suit in equity No. 900 against respondents to restrain any sale of these lands upon these grounds:

(a) That the lien under which he acquired title was superior to that claimed by Swift.

(b) That Swift's attachments were void.

(c) That Swift had been guilty of culpable laches amounting to an abandonment of its attachments if it ever had any.

XV.

Said District Court held that although the tax lien was prior to that of Swift, petitioner's rights began at the time of the tax sale, and not at the date of assessment, and that therefore petitioner was entitled only to a paramount lien for the amount he had paid the Sheriff with interest; that Swift's attachment was valid; and that Swift had been guilty of no laches, and entered a decree accordingly, June 22, 1939.

XVI.

Petitioner carried said case to the United States Circuit Court of Appeals for the Sixth Circuit, and that Court on April 9, 1940, without delivering any opinion, entered the following order:

"Before Hicks, Allen and Hamilton,
Circuit Judges.

This case was heard upon the transcript, briefs and argument of counsel, and it appearing that the District Court did not err in deciding that the purchaser at a sheriff's sale by virtue of the tax sale and deed from the sheriff takes the land subject to liens existing at the time of sale (Hall v. Hall, 174 Ky. 354; Smith v. Young, 178 Ky. 376; Drane v. Graves, 261 Ky. 787); and the record presenting no reversible error, it is ordered and adjudged that the judgment of the District Court entered on June 22, 1939, herein appealed from, be and the same is in all things affirmed.

Approved for entry:

(S) Florence E. Allen,
Circuit Judge."

Filed: April 9, 1940.

XVII.

By said order said Circuit Court of Appeals ignored entirely and refused to follow the law of Kentucky, with reference to

(a) The rights of prior lien holders.
(b) Jurisdictional validity of attachment proceedings, and
(c) Culpable laches

and the Kentucky cases cited in said order as supporting it are all either against the position of the Court or have no reference whatever to the position taken, and said order contains on its face grave error affecting the substantial rights of petitioner.

Wherefore, the premises considered, to the end that the manifest errors appearing in the order of said Circuit Court of Appeals, and in the decree of said District Court may be reviewed and corrected petitioner prays a writ of certiorari to said Circuit Court of Appeals directing that a certified copy of the record and proceedings in said case No. 8368 lately pending in said Court wherein Lilley Cornett was appellant and Swift Coal & Timber Company, *et al.*, were appellees, be transmitted here for review.

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